

# **Dr. John H. M. Chen v. U.S. General Accounting Office**

**Docket No. 17-201-17-82**

**Date of Decision: February 22, 1983**

**Cite as: Chen v. GAO (2/22/83)**

**Before: Bussey, Presiding Member**

**National Origin Discrimination**

**Disparate Treatment**

## **DECISION OF THE PRESIDING MEMBER**

This case is before the Personnel Appeals Board on a petition for review filed by Dr. John H.M. Chen, and was assigned to the Presiding Member for hearing and decision. Dr. Chen alleges that, in violation of Title VII of the Civil Rights Act, he was denied employment at the General Accounting Office (GAO) because of his national origin (Chinese).

### **Background**

Dr. Chen was born in China in 1921. He emigrated to the United States in 1956 at 35. Between that time and 1968, he earned an M.S. Degree in Library Science from Virginia Polytechnic Institute, an M.S. Degree in Library Science from Columbia University, an M.A. Degree in Educational Technology from New York University, and a Doctor of Education Degree from Pennsylvania State University.

From 1963 to 1973, Dr. Chen was employed at various colleges and universities as a faculty member and/or library director. From 1973 to 1975 he was Director of the Learning Resources Center at Somerset County College in New Jersey. In 1975, he was appointed Dean of Learning Resources and University Libraries and Professor of Educational Communications and Library Science at Alabama State University. In 1977, Dr. Chen resigned his position at Alabama State and moved with his wife and four children to the Washington, D.C. area for personal reasons. He was then involved as an Advisory Committee member of the White House Conference on Library and Information Services, and hoped to secure full-time employment with the Federal Government. To date he has not obtained such employment. Since 1977, Dr. Chen has done consulting work, mainly in the area of adult education, for the National Council of Asian/Pacific Americans.

In November 1980, Dr. Chen applied for employment at the GAO in response to six GAO vacancy announcements, for positions ranging from GS-7 through 13 in two different job series, Series 1701, Training Evaluation Specialist, and Series 1710, Education Specialist.<sup>1</sup> He was placed on the certificates of "best qualified candidates" for all of the announcements.<sup>2</sup>

In December 1980, the GAO selected eleven persons to fill positions at GS-1701-9 and 12, and at GS-1710-7, 9, 11, and 12. Dr. Chen was not selected for any of the vacancies. All of those selected are Caucasian. Initially, the selecting officials made choices without interviewing Dr. Chen for any of the positions. Before the selections became final, they were reviewed by the Deputy Director of Personnel,

Ms. Patricia Moore, who suggested, in light of Dr. Chen's education and background, that he be interviewed before the selections were made final. As a result, an assistant to the selecting official called Dr. Chen on the telephone, and reported that she had difficulty understanding him. Soon thereafter the initial selections were made official.

On April 10, 1981, Dr. Chen timely filed an EEO complaint with GAO alleging that he was not selected for any of the vacancies because of his national origin. After investigation, the Director of GAO's Civil Rights Office, Mr. Alexander Silva, issued a recommended final agency decision on April 29, 1981, in which he concluded that "[h]ad Dr. Chen been interviewed in person the agency might have been able to adequately demonstrate that his accent would seriously impair him from performing the oral communications tasks required for employment. But the agency has not carried this burden, primarily because it relied on an 11th hour telephone conversation of disputed content and duration." Mr. Silva recommended that Dr. Chen be interviewed in person jointly by the Director, Office of Organization and Human Development, Mr. A.F. Franklin, and the Deputy Director of Personnel, Ms. Patricia Moore, to determine whether they believed Dr. Chen's accent would, or would not, seriously impair him from performing the duties of the Education Specialist (Series 1710, GS-11) position.<sup>3</sup>

Mr. Silva's recommendation was forwarded to the Special Assistant to the Comptroller General, Mr. Milton Socolar, for final agency decision. Mr. Socolar ordered the pre-employment interview recommended by Mr. Silva. That interview took place on June 10, 1982, after which Mr. Franklin and Ms. Moore concluded that "Dr. Chen would be seriously impaired from performing the duties of the GS-1710-11 position" because of his oral communication difficulties.<sup>4</sup>

On July 7, 1982, Mr. Socolar rendered the final agency decision on Dr. Chen's complaint. He stated that, in response to Mr. Silva's recommended decision, he requested a pre-employment interview by Mr. Franklin and Ms. Moore "so that in making a final decision on your complaint I could have the benefit of their assessment of your English-speaking ability." He concluded that "[t]he central reason for having two senior managers interview you was to objectively determine whether the agency erred in December 1980 when it decided that your accent presented a large and legitimate barrier to employment consideration as an GS-1710-9/11 Education Specialist .... [Y]ou have not persuaded the agency that it erred in its initial assessment of speech seriously impairing your employability for the position involved." Consequently, the Agency's final decision on Dr. Chen's complaint concluded that he had not been discriminated against.

Dr. Chen then filed this appeal with the Personnel Appeals Board. Prior to the hearing, the parties agreed to the following stipulation:

Petitioner is qualified for any and all positions in question, but for resolution of the issue before the Board. Therefore, his technical qualifications and prior employment record are not in question and are not before the Board for adjudication. Furthermore, the qualifications of the actual selectees are also not in question and are not before the Board for adjudication.

The only issue before the Board is whether the Agency erred in its determination that Petitioner's oral communication would seriously impair or prevent him from performing the duties of all the vacant positions in question.

## **Contentions of the Parties**

## **Petitioner's Position**

Dr. Chen alleges that, in violation of Title VII of the Civil Rights Act of 1964, as amended, he was discriminated against because of his national origin when he was not selected for any of the job vacancies for which he applied at the GAO. Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a)(1).

The Petitioner claims that he has made a prima facie case of discrimination according to the standards set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 242 (1981), since he (1) belongs to a protected class, (2) applied for and was qualified for the jobs for which the GAO was seeking applicants, (3) was rejected for the jobs despite meeting the required qualifications and (4) after his rejection, the GAO filled the positions with individuals who possessed qualifications similar to his.<sup>5</sup>

Dr. Chen rejects the GAO's contention that no discrimination was involved but that he was denied employment because his oral communication would seriously impair or prevent him from performing the duties of the vacant positions in question. He cites his extensive education in the United States which led to a number of academic degrees. For all of it a thorough knowledge of English was required since that was the only language in which courses were taught and in which his term papers were acceptable.

The Petitioner further relies on his work record to show that he has had to be familiar with the English language in order to be hired for, and hold, the types of positions he has had. These included teaching, lecturing, and the development of libraries as well as instructing faculty and students on research methods and facilities.

The Petitioner claims that the GAO contention that his oral communication would seriously impair or prevent him from performing the duties of the vacant positions in question was simply a pretext for discriminating against him because of his national origin.

## **Respondent's Position**

The GAO agrees that Dr. Chen is qualified for the positions for which he applied, except for an oral communication problem which would hinder or prevent him from carrying out critical duties of the jobs in question. Respondent argues that the type of education and training required in the Agency is different from that which Dr. Chen has done in the past. It calls for particularly persuasive oral communication skills. The Agency fears that Dr. Chen's manner of speech will be a great handicap in convincing frequently unwilling audiences that they would benefit from training programs and in motivating them to participate fully and enthusiastically. It contends that in his past university experience, Dr. Chen dealt with captive audiences which had to pay close attention to his manner of speech in order to complete the required university course work. The situation of the GAO trainees is a very different one and the fact that Dr. Chen is difficult to understand will make him ineffective with that audience.

Dr. Chen was given every opportunity to convince management of his ability to communicate effectively. His case was fully investigated by the Civil Rights Office. Special interviews were arranged for him with the Deputy Director of Personnel, Ms. Patricia Moore, and the Director of the Office of Organization and Human Development, Mr. A.F. Franklin, and even with the Special Assistant to the Comptroller General, Mr. Milton Socolar. All of these individuals found his oral communication skills to be inadequate and were convinced that he would not be able to carry out effectively the duties of the positions for which he had applied.

The Agency states that Petitioner has not made a prima facie case of discrimination. Being qualified for the jobs included being able to communicate orally. The GAO did not discriminate when it refused to hire him. Rather, it had a legitimate reason for not considering him qualified.

## **Findings**

The sole issue before the Personnel Appeals Board is whether Dr. Chen would be seriously hampered from performing the duties of the positions for which he applied because his ability to communicate orally is inadequate. The Agency has stipulated that in all other respects the Petitioner is qualified for any and all of the positions in question.

Dr. Chen applied for two different job series--Series 1701 and 1710. The 1701 positions, which were filled at GS-9 and GS-12, primarily involve the evaluation of training programs and the assessment of training needs. There generally is no teaching, training, or lecturing involved in the duties of the position. As suggested by the position descriptions, and confirmed by the testimony of Mr. Steve Medlin, Acting Manager, Organizational Analysis and Planning Branch, OOHD, during the hearing, the communications skills necessary are those inherent in interpersonal communications. The incumbent in these positions must be able to carry on effective conversations with professionals in order to understand their needs. It is by this means that he must determine whether the training programs meet those needs and what, if any, changes are required.

For the 1710 Series positions, which were filled at the GS-7 through GS-12 levels, the oral communications skills required are even greater than those for the 1701 Series. According to the position descriptions and the testimony of Ms. Rosalind Cowie, Manager, Training Branch, OOHD, the incumbents in the series are responsible for developing training programs and conducting actual training.

There can be little doubt that oral communication is an important aspect of each of the positions listed. As pointed out by the Agency, each requires that the incumbent be in touch on a continuing basis with managers as well as trainees, prepare materials that are easily understood in training sessions, be aware of the problems that need to be placed on a training agenda at a given time, and be fully cognizant of, and responsive to, the extent to which staff being trained consider the training materials and lectures relevant to their needs. Although written materials and visual presentations are used, much of what is accomplished depends on personal, oral, contact.

At the hearing of December 2, 1982, Dr. Chen testified at length on his behalf. Those present did not have the need to ask him to repeat, nor were their responses such that the Presiding Board Member was led to believe that Dr. Chen's statements had been misunderstood. Dr. Chen also understood what he was asked. Whatever communications problems were present were not beyond those frequently encountered in other hearings.

But since the issue of oral communication was such a critical one, since there were numerous errors in the transcript, and since it is reasonable to assume that a plaintiff at a hearing has had prior knowledge of the subject matter on which he will be asked to testify and can thus prepare, the Presiding Member thought it advisable to observe Dr. Chen's oral communication ability once more--this time in a situation with which he was unfamiliar. Thus a supplemental hearing was held on January 26, 1983. On this occasion, broad, general, questions were put to Dr. Chen by the Board Member to which his responses were, of necessity, totally spontaneous.

The Presiding Board Member had no difficulty understanding Dr. Chen's responses to questions for which he was totally unprepared. He spoke clearly, and answered directly and succinctly. She did not find instances in which he rambled or in which his answers were unrelated to the question as alleged by the GAO in the December 2, 1982 hearing.

Obviously, a Chinese national who did not come to the U.S. until age 35, will not speak English the way a similarly well-educated, native-born, American would speak it. Differences in tonal quality, emphasis, modulation, intonation and enunciation are all characteristics of someone who has learned English as a second language. They require that the listener pay closer attention than he does when speaking with someone from his own society and/or community, but do not necessarily mean that the foreign-born individual in question has not mastered the English language, or cannot communicate in it.

It is clear to me from the record--from Mr. Silva's recommended agency decision, from the interview report of Ms. Moore and Mr. Franklin, and from Mr. Socolar's final agency decision--that it is Dr. Chen's accent, and pronunciation and grammar difficulties related to his accent, that constituted GAO's reason for rejecting Dr. Chen. Based on my observation of Dr. Chen's testimony, and a review of the cited Agency documents, I am convinced that GAO's rejection of Dr. Chen was not in fact based upon rambling speech or indirect answers.

It is a central purpose of Title VII of the Civil Rights Act to ensure that individuals will not be denied employment simply because they look, or speak, somewhat differently than the majority of the workforce of which they wish to become a part. Basing an employment decision on accent may violate Title VII of the Civil Rights Act. The EEOC, in its Guidelines on Discrimination Because of National Origin, has recognized this. See 29 C.F.R. §§1606.2 and 1606.6.

In Carino v. University of Oklahoma, 25 FEP Cases 1332 (W.D. Okla. 1981), plaintiff, a naturalized American citizen, born in the Philippines, who had "a noticeable accent resulting from his national origin", was demoted from a supervisory job. Id. at 1333. He brought suit under Title VII, alleging that defendant's employment decision violated the prohibition against national origin discrimination. The District Court reasoned:

Testimony of both plaintiff's and defendant's witnesses have convinced the Court that the plaintiff's accent was a major factor in the defendant's evaluation of his supervisory abilities. The Court considers it important to its decision to address the question of whether adverse employment decisions made on the basis of an accent which results from national origin would constitute discrimination on the basis of national origin within the purview of Title VII.

\* \* \*

The Fifth Circuit Court of Appeals reasoned in Garcia v. Gloor that a trait related to national origin must be of an immutable nature in order to come within Title VII protections. Garcia v. Gloor, 618 F.2d at 269. An accent would appear to approach that sort of immutable characteristic ... Although

not as permanent as race or color, an accent is not easily changed for a person who was born and lived in a foreign country for a good length of time. This Court cannot give legal cognizance to adverse employment decisions made simply because a person speaks with a foreign accent ... resulting from birth and life in a foreign country.

Id. at 1336-1337. See also, Berke v. Ohio Department of Public Welfare, 628 F.2d 980 (6th Cir. 1980). Thus, on its face, GAO's reason for not hiring Dr. Chen violated Title VII's ban on national origin discrimination.

The magnitude of difference between the speech of a foreign born individual and that customary among native-born U.S. citizens is, of course, crucial in determining whether or not a person can perform a certain type of work. Here, court decisions have defined the point where the difference in degree becomes a difference in kind. Thus in Mejia v. New York Sheraton Hotel, 459 F. Supp. 375 (S.D.N.Y. 1978), the court found that:

The evidence in the case established beyond peradventure of doubt a serious past and current inability on the plaintiff's part to articulate clearly or coherently and to make herself adequately understood in the English language.... Plaintiff's exhibition on the witness stand emphasized the current existence of an English language deficiency that made it quite difficult for the Court, the reporter and counsel to understand what she was saying in her testimonial responses.

459 F. Supp. at 377. The court concluded that the hotel did not violate Title VII in denying a front desk cashier position to an employee of Hispanic origin who, in addition to her accent, had great difficulty speaking the English language.

The Presiding Member does not find "a serious ... inability on [Dr. Chen's] part ... to make [himself] adequately understood in the English language." Dr. Chen can be understood when he speaks English and there is no doubt about the meaning of what he says. This being the case, the petitioner has satisfied the requirements of a prima facie case of discrimination, and the Agency has not articulated a legitimate, non-discriminatory reason for not hiring him. Dr. Chen was fully qualified for the positions when he applied and the GAO did discriminate against him on the basis of his national origin when it refused him employment in any of them in 1980. The GAO agreed that Dr. Chen was otherwise qualified for all of the positions for which he applied. Thus the petitioner is entitled to the GS-12 position he has requested.

## **Decision**

The Petitioner's request for employment as a GS-12 in a Series 1701 or 1710 position is granted. Dr. Chen is to be employed in the next vacancy in either Series, to be placed and compensated at the GS-12, step 1, pay level when so hired and to be given back-pay at that grade commencing on the date the last GS-12 vacancy in question was filled and continuing until the date of his employment. Back-pay shall be subject to a reduction of interim earnings and unemployment insurance compensation received, if any.

## **Notes**

1. The positions for which he applied were EX-D-3A [Education] Specialist (Curriculum Development) in job series GS-1710-9 or 11, EX-D5 Education Specialist, in job series GS-1710-12, EX-D-6 Education Specialist, in job series GS-1710-7, EX-D-8, 9 and 10. Training Evaluation Specialist, in job series GS-1701-7, 8, 11, 12 and 13. There was only one vacancy at the GS-13 level, but in all other instances a

number of positions were available.

2. For example, of 30 applicants for announcement EX-D-3A, Dr. Chen was the second highest ranked candidate with 94 points. The cut-off score for the certificate of best qualified candidates for the GS-1710-11 positions was set at 83 points. The certificate of best qualified candidates for the GS-1710-9 positions included eight persons who scored below 83 points, plus Dr. Chen and three others who had scored 83 points or above. Five selections were made (three for GS-1710-11 and two for GS-1710-9), but Dr. Chen was not selected. (Recommended Agency Decision, April 24, 1981, pp. 2-3.)

3. The agency's investigation of Dr. Chen's EEO complaint focused only on the Education Specialist positions. The record reveals no reason why the Training Evaluation Specialist positions were not included as options.

4. June 16, 1982 memorandum from Mr. Franklin and Ms. Moore to Mr. Silva.

5. See S. Scott Bowser v. GAO, PAB Decision No. M4-B4 (December 21, 1981).